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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

In re the Marriage of PEGGY and
BARRY LEE SMITH

PEGGY SMITH,

Appellant,

v.

BARRY LEE SMITH,

Respondent.

B288422

(Los Angeles County
Super. Ct. No. BD338650)

APPEAL from an order of the Superior Court of
Los Angeles County. Shelley Kaufman, Judge. Affirmed.

Albrecht & Albrecht and W.E. Jon Albrecht for Appellant.

Ludwig Law Center, Eric S. Ludwig and Michelle P.
Ludwig for Respondent.

Peggy Smith (Peggy) appeals from an order denying her motion for a determination of child support arrears.¹ Respondent Barry Lee Smith (Barry Lee) stopped paying child support when the parties' younger child reached the age of majority in 2009. Eight years later, on July 12, 2017, Peggy filed her request for order seeking arrearages. The trial court considered extrinsic evidence in interpreting the parties' marital settlement agreement, and determined that it was the parties' intention that support end when the children attained age 18. The court thus found no arrears due and owing, and denied Peggy's request for attorney fees.

We find no error and therefore affirm the order.

BACKGROUND

The parties married on February 5, 1977, and separated in January 2001. They had two children, Jacob, born in September 1989, and Jonathan, born in July 1991. Peggy filed a petition for dissolution on January 30, 2001. The judgment of dissolution of marriage was prepared by Peggy's attorney, and was filed and entered on September 10, 2001. Barry Lee was not then represented by counsel. No further orders were entered prior to the filing of this action.

The marital settlement agreement incorporated into the judgment provided, in paragraph 7:

“Respondent shall pay to petitioner as and for family support the sum of \$1,500.00 per month for the support of the minor children and petitioner, payable one-half on the first and one-half on the

¹ As is customary in family law cases when the parties share a last name, we refer to the parties by their first names. (*In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 631, fn. 1.)

fifteenth day of each month commencing April 1, 2001, and continuing until further order of the court. Said family support is based on petitioner earning \$1,204.00, gross, per month and also receiving aid to adopting parents (AAP), and respondent earning \$6,270.00, per month, with 20% custodial care of the children.”

The marital settlement further provided, in paragraph 11:

“Pursuant to Family Code 3901, the obligation to pay child support shall continue as to any unmarried child who has attained that age of eighteen years, is a full time high school student, or is not self supporting, until such time as the child completes twelfth grade or attains the age of nineteen years, whichever occurs first. Each party acknowledges that they have been fully informed on their respective rights concerning child support, and they agree that the stipulated amount is in the best interest of the children, the support awarded is agreed to without coercion or duress, the needs of the children will be adequately met, and the right to support has not been assigned to the county pursuant to the Welfare and Institution Code section 11477, and that no public assistance application is pending.”

Barry Lee timely paid child support in the amount of \$1,500 per month from the time of the judgment until September 2007, when the parties’ older child reached age 18. Respondent then reduced the payment to \$750 per month for the remaining minor child, and paid \$750 per month through June 2009 when he stopped paying support altogether, as both children had reached age 18. Peggy never asked why Barry Lee cut the child support to \$750 per month in 2007. Nor did she ask him why he

ceased making payments in 2009. In fact, during the years he made payments, when he voiced concern to Peggy about his finances, she would remind him he had only a limited time left to pay support.²

Eight years later, on July 12, 2017, Peggy filed a request for order seeking arrearages for Barry Lee's alleged failure to continue to pay her \$1,500 per month since September 2007 through the filing of the request in July 2017. Peggy claimed that Barry Lee "unilaterally terminated family support without court order on July 1, 2009." She sought arrears of \$160,500 plus interest of \$101,595 for a total arrearage of \$262,095 through July 2017. She also requested attorney fees and costs.

Barry Lee filed a responsive declaration on August 1, 2017. He alleged that he had fully complied with the marital settlement and stopped making payments when his children attained the age of majority, pursuant to the terms of the settlement. Barry Lee further attested that he often gave Peggy more than was required, and never financially neglected his family.

On October 10, 2017, Barry Lee filed a request for evidentiary hearing. On October 13, 2017, Peggy filed a motion in limine (the motion) seeking to exclude "any testimony, evidence, explaining or interpreting of the September 10, 2001 Judgment." The motion was based on the premise that parol evidence is inadmissible to explain unambiguous documents, but only relevant to clarify an ambiguity. Peggy argued that the marital settlement contained no ambiguities, and no such ambiguities had been alleged. Barry Lee opposed the motion,

² Peggy denied making such a statement, but the trial court found Barry Lee to be more credible.

arguing that the marital settlement was ambiguous and therefore the court should admit extrinsic evidence relevant to the meaning of the ambiguous content.

The hearing was held on October 23, 2017. The court found that the marital settlement was “ambiguous taken as a whole.” The court understood Peggy’s position that the term “family support” generally meant “child support and spousal support without making any distinction as to either,” but concluded that paragraph 11 of the settlement agreement, which specifically mentioned child support, rendered the meaning of paragraph 7 ambiguous. Because the terms of the settlement agreement were susceptible to more than one meaning, the court allowed extrinsic evidence.

Testimony was provided from both Peggy and Barry Lee. Barry Lee testified that it was the parties’ intention that the \$1,500 monthly payment was for child support. It was their understanding that when the children were emancipated, no further support would be due. Peggy claimed her understanding was that the support would continue until there was a court order to the contrary. She did not seek enforcement prior to the instant action because she could not afford an attorney.

The trial court found Barry Lee to be a more credible witness. Peggy, on the other hand, responded primarily to leading questions and did not state the intent of the parties. Further, she did not refute Barry Lee’s claim that the parties intended the support to benefit the children until they attained age 18. The court believed Barry Lee’s testimony that Peggy had acknowledged that his support obligations would end when the children reached age 18. In addition, her conduct over the eight years following termination of payments supported Barry Lee’s

assertion that the parties intended the payments to end when the children reached age 18.

The court found no arrears due or owing. It further found that since Peggy did not prevail on her claims, she was not entitled to attorney fees.

The court's written order was filed on December 28, 2017. On February 27, 2018, Peggy filed her notice of appeal.

DISCUSSION

Peggy raises several issues on appeal. First, she argues that the trial court erred in admitting parol evidence to interpret the marital settlement agreement between the parties. Second, she argues that the trial court erred in interpreting the agreement as allowing support payments to cease when the children reached the age of majority. Finally, Peggy argues that she was entitled to attorney fees and costs below.

I. Applicable law and standards of review

“Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of contracts generally.’ [Citation.] The primary object of contract interpretation is to ascertain and carry out the mutual intention of the parties at the time the contract was formed, determined from the writing alone, if possible. [Citations.]” (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 687-688 (*Nassimi*).)

In interpreting a marital settlement agreement, “[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.’ (Civ. Code, § 1641.)” (*Nassimi, supra*, 3 Cal.App.5th at p. 688.) This means that we must interpret the agreement giving force and effect to every provision, and “avoid

constructions which would render any of its provisions or words ‘surplusage.’ [Citation.]” (*Ibid.*) In sum, we must consider each provision “in view of the intended function of the provision and of the contract as a whole. [Citation.]” (*Ibid.*)

“The interpretation of a contract involves ‘a two-step process: “First the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine ‘ambiguity,’ i.e., whether the language is ‘reasonably susceptible’ to the interpretation urged by a party. . . .”’” (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351 (*Wolf*)). “[I]t is reversible error for a trial court to refuse to consider such extrinsic evidence” even if “the language of the contract appears to be clear and unambiguous on its face.” (*Ibid.*) “Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning” to which the contract is reasonably susceptible. (*Ibid.*)

If, in light of the extrinsic evidence, the court decides the language is ambiguous, the extrinsic evidence is admitted to aid in interpreting the contract. (*Wolf, supra*, 114 Cal.App.4th at p. 1351.) The trial court’s determination of whether an ambiguity exists is a question of law, subject to de novo review on appeal. (*Ibid.*)

When an ambiguity exists, and conflicting parol evidence is admitted, the court’s resolution of the conflicting evidence is a question of fact which must be upheld on appeal if supported by substantial evidence. (*Wolf, supra*, 114 Cal.App.4th at p. 1351.)

II. The trial court did not err in admitting extrinsic evidence of the parties' intentions

As set forth above, the trial court was required to provisionally receive extrinsic evidence regarding the parties' intentions in order to interpret the marital settlement agreement. It would have been error for the trial court to refuse to receive such evidence. (*Wolf, supra*, 114 Cal.App.4th at p. 1351.)

The trial court did not err in its decision to admit and consider such evidence in determining the parties' intentions. The court did so based on its conclusion that the marital settlement agreement was ambiguous. Reviewing the agreement de novo, we agree. Paragraph 7 of the agreement referred to "family support," which generally means a combination of child support and spousal support.³ However, paragraph 11 of the agreement referred to the same payment only as child support, and specified that such payments should end when the children reached the age of majority. Nowhere in the agreement was the term "spousal support" mentioned, nor was there any distinction drawn between an amount designated as child support and an amount designated as family support. Under the circumstances, the contract, taken as a whole, was ambiguous as to whether the payments at issue were intended as child support or family support, and whether such payments would end when the

³ Family Code section 92 states: "Family support' means an agreement between the parents, or an order or judgment, that combines child support and spousal support without designating the amount to be paid for child support and the amount to be paid for spousal support."

children reached the age of majority. Because the contract was ambiguous, the trial court properly considered extrinsic evidence offered by the parties to ascertain their intent. (See, e.g., *Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 183 [“Because the language of the settlement agreement was ambiguous, the trial court was required to consider extrinsic evidence of the parties’ intent”].)⁴

III. The trial court’s resolution of the conflicting evidence is supported by substantial evidence

Having concluded that the trial court properly relied on extrinsic evidence to interpret the marital settlement agreement between the parties, our role is to determine whether substantial evidence supported the trial court’s resolution of the conflicting evidence of the parties’ intent. We conclude that it does.

The trial court made the factual determination that the parties intended Barry Lee’s monthly payments to be for the

⁴ Peggy takes the position that, because Barry Lee’s pleadings in this matter did not raise the issue of ambiguity of the marital settlement agreement, and he did not request that the court modify or set aside the agreement, the trial court should not have raised these issues. However, the record shows that Barry Lee appropriately defended against Peggy’s request for arrears by filing a responsive declaration that he complied fully with the marital settlement and stopped making payments when his children attained majority, pursuant to the language of the settlement. The court was therefore required to interpret the marital settlement agreement in order to determine whether Peggy was owed arrears or not. Contrary to Peggy’s position, the court did not retroactively modify the settlement agreement, but interpreted the agreement to carry out the parties’ intentions at the time the agreement was formed.

support of the children, and to cease when the children reached the age of majority. Substantial evidence in the record supports this conclusion. Barry Lee testified that he and Peggy discussed his support obligations for months in order to determine the best economic situation for the children. They consulted with a tax advisor in order to maximize the monetary benefit to the children, and ultimately the sum of \$1,500 was agreed upon as family support.⁵ They did not discuss spousal support, but agreed that the money would go to Peggy for the support of the children. Both parents understood that when the children were emancipated, no further support would be due. When the older child turned 18 and Barry Lee reduced the support to \$750 per month, Peggy did not object. After he stopped paying support when the second child reached age 18, Peggy never contacted Barry Lee or asserted that he was required to continue making payments. Further, during the years that he was paying support and expressed concern about his finances, Peggy reminded Barry Lee that he did not have much longer left to pay support. This testimony by Barry Lee constitutes substantial evidence supporting the trial court's determination that the parties intended the payments to stop when the children reached majority.

⁵ As Peggy points out, because the payments were designated as "family support" in the agreement, the payments were tax deductible to Barry Lee, who took advantage of this tax benefit. However, Barry Lee testified that the parties agreed to this designation with the best interests of the children in mind. Barry Lee's use of the tax benefit is not determinative of the question of when the parties intended the payments to cease.

While Peggy provided contrary testimony, it is not our role to reweigh the evidence. (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454 [“An appellate court will not reweigh the evidence, but rather views the record in the light most favorable to the prevailing party and resolves all evidentiary conflicts and indulges all reasonable inferences in support of the judgment”].) Notably, the trial court specified that its decision was based on the credibility of the parties. The court found Barry Lee to be more credible than Peggy. Barry Lee explained the intent of the parties and explained that he acted within the expectations of the parties. Peggy, on the other hand, “responded primarily to leading questions and did not state the intent of the parties.” In addition, “[h]er demeanor demonstrated a lack of reliability,” and she “did not refute [Barry Lee’s] claim [that] the parties intended for the support to benefit the children and [Peggy] until the children attained age 18.” The trial court found Peggy was not credible when she claimed that she called Barry Lee once in eight years regarding his termination of support payments, nor was she credible when she said she did not seek enforcement of the agreement for eight years because she could not afford an attorney. The court also noted that Peggy’s conduct was relevant to its interpretation of the contract. (Citing *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393 [“party’s conduct occurring between execution of the contract and a dispute about the meaning of the contract’s terms may reveal what the parties understood and intended those terms to mean”].)

The credibility of witnesses, and the weight to be given their testimony, are within the sole province of the trial court. (*As You Sow v. Conbraco Industries, supra*, 135 Cal.App.4th at p.

454.) A trial court's findings of fact, to the extent that they rest on an evaluation of credibility, should be regarded as conclusive on appeal. (*Estate of Fries* (1965) 238 Cal.App.2d 558, 561.)

Substantial evidence supports the trial court's determination that the parties intended the payments to cease after the children reached the age of majority, thus no arrears were owing.

IV. Attorney fees

Peggy's request for attorney fees was based on both the judgment of dissolution of marriage and Family Code section 3557.

The judgment provided that, "[s]hould either party fail to perform . . . and the other party is thereby required to incur attorney fees . . . the unsuccessful party to such litigation shall pay to the successful party therein all costs and expenses, expressly including but not limited to, reasonable attorney fees."

Family Code section 3557 further provides that a court "shall award reasonable attorney's fees to," among others, "[a] supported spouse in an action to enforce an existing order for spousal support." (Fam. Code, § 3557, subd. (a)(2).)

Peggy did not prevail on her action to enforce an alleged agreement for spousal support. Therefore, the trial court properly denied her request for attorney fees.

DISPOSITION

The order is affirmed. Respondent is awarded his costs of appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT